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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HERBERT ROBERTSON,

Defendant and Appellant.

B209041

(Los Angeles County
Super. Ct. No. BA325065)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Patricia Titus, Judge. Affirmed.

Cannon & Harris, Gregory L. Cannon, under appointment by the Court of
Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C.
Brenan and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant, Herbert Robertson, appeals the judgment entered following his conviction, by jury trial, for sale of a controlled substance (cocaine base), with prior serious felony conviction and prior prison term enhancements (Health & Saf. Code, § 11352; Pen. Code, §§ 667, subd. (b)-(i); 667.5). He was sentenced to state prison for a term of eight years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. Prosecution evidence.

On June 30, 2007, John Armando, a detective with the Los Angeles Police Department, was working on a drug enforcement detail. He was in an observation post with his partner, Officer Dale Zeismer. They were monitoring the area of Seventh and San Julian Streets, a location saturated with cocaine base. An average rock of cocaine sold for \$5 in this area.

Armando saw defendant Robertson standing on San Julian. Robertson was wearing a long-sleeve, blue T-shirt and blue jeans. Armando's observation post was 100 feet away from Robertson and 30 feet above him. As Armando watched, a man in a white T-shirt and jeans, later identified as Nathaniel Mallard, approached Robertson. Mallard and Robertson had a brief conversation, and then Mallard gave Robertson some green paper that looked like money. Robertson put the paper into his right front pants pocket. Then, looking up and down the street quickly, Robertson reached into his left front pants pocket and took out a plastic bindle which appeared to contain off-white solids resembling cocaine base.

Robertson twisted open the bindle, removed an off-white solid object, and put the object into Mallard's hand. Putting his hand at chest level with his palm up, Mallard examined the object. Mallard then closed his hand and walked south on San Julian toward Seventh. Robertson put the plastic bindle back into his pocket. Armando radioed the chase officers to detain Mallard. Robertson

remained where he was until Mallard was detained, then he began walking south on San Julian. He appeared to be counting money. Armando radioed for another chase team, gave them Robertson's description, and told them to detain him.

Detective Charles Baley was assisting the chase officers. In response to Armando's first call, Baley closed in on Mallard, who looked in Baley's direction and then dropped an off-white solid object onto the sidewalk. Baley picked up the object. He also took a glass pipe, commonly used for smoking cocaine base, from Mallard.

Officers Brown and Pozo received Armando's call to detain a man in a long-sleeve, blue shirt and blue pants who was counting money and walking south on San Julian. Robertson was the only person meeting this description. When Brown and Pozo caught up with him, Robertson had \$77 on him, consisting of eight \$5 bills and thirty-seven \$1 bills. Robertson also had a clear plastic bindle.

Armando and Zeismer left the observation post and drove to where Robertson and Mallard were being detained. They informed the chase officers they had detained the correct suspects.

Richard Raffel, a criminalist, testified the object Mallard dropped on the sidewalk weighed 0.6 grams and contained cocaine base. Armando testified this was the type of rock that would sell for \$5 in the area. No visible residue was detected on the plastic bindle recovered from Robertson, even after the bindle was swabbed. Raffel testified residue is not always found when cocaine base is kept in a bindle.

2. Defense evidence.

Robertson testified in his own defense and denied selling drugs.

Around the time of the incident he was living in a drug program house at Fifth and San Pedro Streets. He had been earning money by selling cigarettes for 25 cents each. He had made almost \$40 that week this way. On the day he was arrested, he started out carrying two \$10 bills and one \$20 bill.

Robertson needed toiletries from Rite Aid, which was 8 or 10 blocks away, but he only had permission from the program house to walk around the block. So he arranged for his friend Mike McDuff to buy what Robertson needed from the Rite Aid. McDuff was supposed to collect the money from Robertson but he never showed up, so Robertson got permission to look for him. Robertson searched for McDuff, but couldn't find him. As he was walking down the street, Robertson kicked a bag lying on the sidewalk. Some objects rolled out of the bag: a small container of orange juice, an empty bottle of vodka, and a small plastic bindle. Saying to himself, "Oh, that looks like drugs," Robertson picked up the bindle, opened it, and discovered a \$50 bill. "So I took the \$50 bill, put it in my pocket, took the piece of plastic, stuck it in my pocket like that." Now he had \$90.

Robertson walked toward the corner of Seventh and San Julian. He ran into his friend Henry Harris, who "used to be a major drug dealer in that area." Harris "pulled out a quarter ounce of dope," but Robertson declined an offer to help Harris sell the drugs.

Robertson then crossed the street and spotted Mallard, whom he knew. Two other people, a man in a Dodgers cap and a woman, were standing behind Mallard. Robertson asked Mallard for change for his \$50 bill. Mallard gave him a \$5 bill and fifteen \$1 bills, and the woman gave him a \$10 bill and a \$20 bill. Robertson gave the woman his \$50 bill. Robertson continued talking to Mallard.

Suddenly, Officers Armando and Zeismer jumped out of a car and grabbed a guy named Short or Shorty. Robertson started walking away. He saw another car pull up to where Mallard was standing. The man in the Dodgers cap was now standing about 20 feet behind Robertson. This man was roughly the same height as Robertson, about 35 years' old, dark-complected and slim. Robertson described himself as stocky.

Then a third car drove up. Officers jumped out and grabbed the man in the Dodgers cap. Robertson reached into his pocket and pulled out fifteen \$1 bills and one \$5 bill, and put the rest of his money away. He took the money out because he was getting ready to meet McDuff, even though he still had not seen him. Robertson testified he was counting the money as he walked down the street.

On cross-examination, Robertson admitted he had been wearing a dark blue, long-sleeve shirt and blue pants that day. He denied having thirty-seven \$1 bills on him when he was arrested. He testified the plastic bag put into evidence by the prosecutor was not the bag in which he had found the \$50 bill. He wanted to count his money before seeing McDuff because McDuff used heroin and would ask for a loan to buy drugs if he saw how much money Robertson had.

CONTENTIONS

1. The trial court erred by failing to appoint substitute counsel to file a new trial motion alleging ineffective assistance of counsel.
2. This court should determine if *Pitchess* discovery was properly made.

DISCUSSION

1. *Trial court did not err by failing to appoint substitute counsel.*

Robertson contends his conviction must be reversed because the trial court abused its discretion by failing to appoint substitute counsel to file a new trial motion based on ineffective assistance of trial counsel. This claim is meritless.

a. Relevant proceedings.

After the jury verdict, Robertson attempted to file a pro se new trial motion which principally raised claims of ineffective assistance of counsel. Robertson did not, in this document, request substitute counsel. In response, the trial court held a hearing under *People v. Marsden* (1970) 2 Cal.3d 118, and asked Robertson to state his complaints about defense counsel.

Robertson said counsel had visited him in county jail for only 10 minutes, “[a]nd every time I tried to talk to him he gave me a song and dance and he was so busy and kept trying to get me to waive time for different cases that he was handling.” Robertson had asked counsel for two letters he had written to his previous attorney, but counsel had not done so; these letters allegedly contained the real name of Shorty. Counsel failed to use an investigator to track down Shorty.

Counsel told Robertson: “Well, I can beat this case. This D.A. is green . . . I could handle him.” Robertson was unhappy with the jury counsel picked.

Counsel refused to call three crucial defense witnesses: McDuff, Harris and Mallard. McDuff would have testified “[h]e was supposed to meet me at the corner and I was going to give him money to go get my supplies at the drug store.” Harris would have testified Robertson spoke to him: “I gave him some money right before the police came. So he could testify as to the number of people on the street except for me and Mr. Mallard, and that was the lie.” According to Robertson’s pro se motion, Mallard would have testified the police planted the cocaine on him, and then coerced him to plead guilty and agree to say Robertson sold him the drugs.

Robertson complained defense counsel “said twice during his statements to the jurors that I had drugs, which I had no drugs.”

Defense counsel responded to these complaints and denied Robertson’s assertions.¹ With regard to the most important issue, his alleged failure to call

¹ For example, counsel said he may have described the prosecutor as “new,” but he never told Robertson the prosecutor was “green.” Counsel had never told anyone he could “handle a jury,” and he could not recall ever telling defendants they had a case beaten. Regarding the amount of time he spoke to Robertson before trial, counsel said, “Your Honor, I don’t get up and walk away – when I go out and interview someone, I don’t get up and walk away unless there is some evidence that the meeting is over.”

crucial defense witnesses, counsel said he had wanted to call the director of the drug program house, but Robertson strongly objected. Mallard had originally been on the prosecution's witness list, but then he decided not to testify. Defense counsel said: "After hearing . . . Mr. Robertson's version of what happened, which is substantially similar to [his] testimony, I didn't think it made sense to put on an affirmative defense. I simply hoped that the negative defense would be effective"

The trial court ruled: "Having sat through the jury trial in this case, I am going to deny your *Marsden* motion or your motion for retrial, for ineffective assistance of counsel. The burden and the standard you have to meet is very very high and you have not met that standard." Regarding all the other grounds Robertson had raised in his pro se new trial motion, the trial court said it would rule on a motion for retrial submitted by defense counsel that day, explaining that because Robertson was represented by counsel he could not file his own motions.

b. *Legal principles.*

"When a defendant seeks discharge of his appointed counsel on the basis of inadequate representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy. [Citations.] 'A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' [Citations.] We review a trial court's decision declining to discharge appointed counsel under the deferential abuse of discretion standard. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1190.)

" 'When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to

courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a "colorable claim" of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 346.)

A bare assertion of inadequate representation is insufficient to require appointment of new counsel; the defendant must make a substantial showing. (*People v. Crandell* (1988) 46 Cal.3d 833, 859, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364.) Simply because a defendant does not like or think highly of his attorney does not compel a substitution of counsel. (*People v. Memro* (1995) 11 Cal.4th 786, 857.) " "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." ' [Citation.]" (*Ibid.*) "We do not find *Marsden* error where complaints of counsel's inadequacy involve tactical disagreements." (*People v. Dickey* (2005) 35 Cal.4th 884, 922.)

"Denials of *Marsden* motions are reviewed under an abuse of discretion standard. [Citation.] Denial 'is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

c. Discussion.

Robertson argues the trial court abused its discretion by denying his pro se motion for new trial without first appointing new counsel to investigate the claims he was making. We disagree.

The bulk of Robertson's complaints about defense counsel were either frivolous or based on a mistaken reading of the record. For example, Robertson complained defense counsel would not let him "draw a diagram of the whole scene." In response to this obscure complaint, defense counsel said: "The diagram, truthfully I don't remember what happened from the witness stand. He attempted to take certain papers up there that I don't think were proper and left here." The record shows that, during his testimony, Robertson was asked by the trial court, "Are you reading from some notes?" Robertson replied, "No. Just looking at a map, a diagram." The trial court had the diagram marked as an exhibit because Robertson used it to refresh his memory. As another example, the record shows defense counsel did not, contrary to Robertson's assertion, tell the jury he had drugs that day.

The principal claim made by Robertson was that defense counsel failed to call three witnesses who would have corroborated his testimony he did not sell drugs to Mallard. In his pro se new trial motion, Robertson called these three his "key vital indispensable witnesses."

Mallard, however, would not testify. As for McDuff and Harris, these two witnesses could not have saved Robertson from conviction. According to Robertson's own assertions, neither witness had been with him at the time he allegedly sold the cocaine to Mallard. Robertson said he spoke to Harris briefly *before* running into Mallard. Robertson's assertion Harris could have testified there were "other people" on the street cannot trump Officer Armando's testimony he saw Robertson sell something to Mallard just seconds before Mallard was caught tossing away a cocaine rock. Armando did not claim the only two people he saw on the street were Robertson and Mallard.² Asked if anything had

² Which is why defense counsel's alleged failure to find Shorty would probably not have made any difference.

obstructed his view of Robertson, Armando testified: “Occasionally, people would pass by. But for the most part, I had an unobstructed view.” And on cross-examination: “At that time and place, would it be fair to say there was a fair amount of foot traffic? [¶] A. Yes.” As for McDuff, Robertson never even claimed to have seen him that day.

In our view, defense counsel did a competent job in the apparent circumstances of this case. It appears Robertson, in spite of counsel’s probable contrary advice, insisted on testifying and told a fairly preposterous story the jury was not likely to believe. Various aspects of that story were not just far-fetched, but seemed deliberately crafted to fit inconvenient facts.³ Moreover, in order to explain a discrepancy in the physical evidence, Robertson testified the police were lying when they said he had thirty-seven \$1 bills on him when he was arrested. In these circumstances, we cannot fault defense counsel for concluding the best strategy would be to focus on two evidentiary details credibly suggesting the police might have arrested the wrong person.

On direct examination, Officer Armando testified he saw Robertson take the plastic bindle out of his pocket, twist it open, and remove an object:

“Q. Prior to him pulling something out of that bindle, could you see from where you were what was in the bindle?

“A. Yes.

“Q. What was in the bindle?

“A. [T]he bindle contained off-white solids resembling cocaine base.”

On cross-examination, defense counsel pressed Armando, who tried to back away from this apparent testimony he had seen more than one cocaine rock in

³ For instance, Robertson’s testimony about finding \$50 on the street, and then keeping not only the money but the plastic bindle as well. Also, his testimony about pulling the money out of his pocket to count it because McDuff was a heroin addict.

Robertson's bindle.⁴ Defense counsel also questioned the prosecution criminalist about why it was unusual not to have found any cocaine residue inside an empty bindle alleged to have been used to carry a drug dealer's rock cocaine. The criminalist acknowledged rock cocaine chips easily, tends to fall apart when rubbed against a package, and tends to leave some powder behind if it stays in a baggie for any length of time. The criminalist agreed that if the baggie were "in and out . . . [of a] person's pocket . . . and them [*sic*] walking around," it would increase the likelihood there would be cocaine residue inside the baggie.⁵

Based on this strategy, defense counsel was able to credibly suggest to the jury that police had arrested the wrong person because there was no evidence of more cocaine rocks or even cocaine residue inside the baggie taken from Robertson: "I'm going to ask you to look at the physical evidence in the case, but I'd like you to start with [Detective] Armando's testimony And when he testified, with binoculars from an observation post, he said he saw someone . . . pull out a baggie from his pocket, give the other person a rock, and have at least

⁴ Armando ultimately testified: "A. Well, I think what I testified is there was at least one in there. There might have been only one. There might have been 2. I don't know."

⁵ On redirect examination, the prosecutor asked: "[I]f cocaine base is kept in a plastic bindle . . . would you always expect to find residue in that type of a bindle left from the cocaine base? [¶] A. Again, depends upon what happens to the cocaine when it's in the bindle, if it's a continuous rubbing. If it's placed in an area where it never gets touched, then you may not see anything. If it's placed in an area where it's constantly rubbed, it may rub off a lot of residue." On recross examination, defense counsel asked: "Basically you're saying the more likelihood of some friction acting on the outside of the bag increases the likelihood you are going to find residue inside? [¶] A. Yes. [¶] Q. And if it's in and out, let's say, a person's pocket, or it's in the person's pocket and them walking around, that increases the likelihood that it should be [*sic*] some residue? [¶] A. If it's come into contact with the solid, it's going to increase, yes, the possibility [of residue coming off]."

one rock remain. [¶] Go back and listen to [Armando's testimony]. There's still a rock in the seller's hand. And if you go back through his testimony, . . . I believe he said the word rocks, plural” “So what happened to the rock? Do they have the wrong person?” “The baggie from Mr. Robertson's pocket, as far as being chemically analyzed, is clean.” “The baggie from Mr. Robertson, through this whole chain of custody to the actual analysis, it probably doesn't have any residue in it. [¶] . . . [¶] . . . If you connect . . . the testimony from Officer Armando to the chemical analysis to what they say were these great observations with the binoculars, and they've got the wrong person.”

“ ‘[W]hen a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant's right to assistance of counsel.’ [Citations.]” (*People v. Horton* (1995) 11 Cal.4th 1068, 1102; see *People v. Jones* (2003) 29 Cal.4th 1229, 1245 [“No abuse of discretion has been shown here, as defendant failed to demonstrate either inadequate representation or irreconcilable conflict”].)

Robertson failed to demonstrate inadequate representation. The witnesses he complained defense counsel failed to call were either unavailable or unhelpful. On the other hand, out of a few weaknesses in the People's case, defense counsel fashioned a respectable defense, a defense far more persuasive than Robertson's testimony.

The trial court did not abuse its discretion by failing to appoint substitute counsel for Robertson.

2. *Review of in camera Pitchess hearing.*

Robertson requests review of the trial court's ruling on his motion seeking discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Review of the in camera hearing by this court reveals no abuse of the trial court's discretion. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.